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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, THE B. F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; and THE STATE OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS HUNT, *ET AL.*

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Question Presented

Do the federal district courts have jurisdiction over a declaratory judgment and refund action challenging a state tax where a plain, speedy and efficient remedy exists in state court, and where the federal claim asserted as the basis for the declaratory relief is merely a federal defense to the continuation of the state tax?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS HUNT, *ET AL.*

The Respondents, Robert Hunt, Administrator of the New Jersey Spill Compensation Fund, *et al.*, respectfully request that this Court deny the Petition for Writ of *Certiorari* seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 683 F. 2d 69.

Statement of the Case

At issue in this case is whether a declaratory judgment and refund action challenging a state tax upon federal preemption grounds belongs in state or federal court in the first instance. The court of appeals found that state court was the proper forum in which to attack the state tax since "[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts . . .," quoting from *Rosewell* v. *LaSalle Nat'l. Bank*, 450 U.S. 503, 515 n.19 (1981) (Pa8).* In addition to relying upon the Tax Injunction Act, 28 U.S.C. §1341, however, the court of appeals found no federal jurisdiction in this case because the only federal claim asserted—Superfund preemption—was in reality nothing more than a federal defense to a state cause of action and consequently did not "arise under" federal law (Pa8 to Pa11).

This case was initiated in May 1981 when Exxon Corporation, the B.F. Goodrich Company, Union Carbide Corporation, Monsanto Company, and Tenneco Chemicals, Inc. (hereinafter "Exxon") filed a complaint against the State of New Jersey in the United States District Court for the District of New Jersey seeking: (1) a declaratory judgment that the tax levied under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, was "unconstitutional and preempted" by Section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510, 94 Stat. 2767, codified as 42 U.S.C. §9601 *et seq.*, also known as the "Superfund" Act or "CERCLA"), and (2) a refund of all tax

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* "Pa" refers to the Appendix submitted on behalf of Exxon Corporation, *et al.*, in support of the present Petition for Writ of *Certiorari*.

monies collected by the State of New Jersey from the plaintiffs under the Spill Act (N.J.S.A. 58:10-23.11h) since December 11, 1980, the effective date of the Superfund Act. Interest on the tax monies paid into the Spill Compensation Fund by plaintiffs was also sought in connection with the refund action.

All five of the plaintiffs are large national and international corporations which operate major facilities in New Jersey that utilize chemical and petroleum products.* The tax created by the Spill Act is levied upon the owners or operators of major facilities in the amount of one cent per barrel of petroleum and either one cent per barrel of hazardous substances or 0.4% of the fair market value of such substances. N.J.S.A. 58:10-23.11h(b). The taxes collected from the major facilities are used to support the Spill Compensation Fund which provides the State of New Jersey with the financial capability to implement the hazardous substance and petroleum spill prevention and control program outlined in N.J.S.A. 58:10-23.11 *et seq.* Among other things, the Spill Fund is authorized to pay spill response costs incurred by the State in protecting the public health, safety, and welfare; third party damage claims including claims for property damage or other economic loss caused by a spill; and the administrative expenses of the Spill Fund. N.J.S.A. 58:10-23.11g; N.J.S.A. 58:10-23.11o. Revenues from the Spill Act total approximately $14 million annually.

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* The Spill Act defines "major facility" as any facility that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances and has a total storage capacity of 50,000 gallons or more for hazardous substances excluding petroleum or 400,000 gallons or more for hazardous substances of all kinds, including petroleum. N.J.S.A. 58:10-23.-11b(1).

The Spill Act specifically provides in N.J.S.A. 58:10-23. 11h(h) that the tax imposed to support the remedial purposes of the Act shall be governed by the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 *et seq.* Pursuant to the procedural mechanisms established by this Law, taxpayers seeking reimbursement for alleged overpayments may file claims for refunds. N.J.S.A. 54:49-14. Taxpayers may also challenge any finding or assessment of the Director of the Division of Taxation by filing a protest, requesting an administrative hearing from the Director, and then appealing any adverse determination rendered by the Director to the Tax Court. N.J.S.A. 54:49-18; N.J.S.A. 54:2-34; N.J.S.A. 2A:3A-4.1. The Tax Court offers taxpayers a *de novo* hearing on all issues of fact and law and is authorized to "grant legal and equitable relief so that all matters in controversy between the parties may be completely determined." N.J.S.A. 2A:3A-4. An appeal as of right from final determinations of the Tax Court is available in the Appellate Division of the Superior Court of New Jersey. N.J.S.A. 2A:3A-4.1(c); N.J.S.A. 2A:3A-10.

The Spill Act tax and the New Jersey petroleum and hazardous substance cleanup program it supports came under attack by Exxon upon the adoption of the Superfund Act. This federal legislation established a national program to combat pollution from hazardous substances, providing $1.6 billion over a five-year period to finance remedial and removal actions at the worst problem sites in the country. See 42 U.S.C. §9605(8) which directs the federal government to establish a national priority list of sites for the purpose of selecting candidates for federally financed cleanup activity. Called "a meaningful first step to address the severe threats posed by abandoned dump-sites, hazardous substance spills, leaks and releases," 126 Cong. Rec.S. 14977 (daily ed., November 24, 1980) (remarks of Senator Huddleston), the Superfund program focuses pri-

marily upon priority sites, exempts petroleum spills from coverage altogether, and does not provide compensation to private parties who incur losses due to hazardous substance releases. It consequently constitutes but a minimal first step toward the eradication of damage caused by hazardous substances—a first step limited not only by statutory constraints on coverage, but by grossly insufficient funding levels.* Despite the limited scope of the Superfund Act and the broader coverage afforded by New Jersey's spill program, Exxon claimed that the Spill Act tax was totally preempted by Section 114(c) of the Superfund Act which provides in pertinent part that:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." 42 U.S.C. §9614(c).

Instead of pursuing this claim against the Spill Act tax through the State tax appeal system, however, Exxon initially chose to circumvent New Jersey's tax procedures by filing a challenge to the state tax in federal district court. Although Exxon's preemption challenge to the New Jersey tax necessarily requires a construction of both a state and a federal statute and places a sensitive state taxing and

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* In regard to funding, a comment from the legislative history of S.1480—a precursor bill to the Superfund Act which proposed an appropriation of $4.1 billion for a national hazardous substance cleanup program—is instructive. In S.Rep.No. 848, 96th Cong., 2d Sess. (1979) at 17 it was noted that even an appropriation of $4.1 billion "will permit government response only to the most significant releases. At this level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment."

environmental protection program in jeopardy, Exxon contended that only a federal court could hear its claims because Section 113(b) of the Superfund Act provided in part that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act . . ." 42 U.S.C. §9613(b). Since the State disagreed with this contention and believed that the strong comity and federalism concerns underlying the Tax Injunction Act barred federal district court jurisdiction over so important a local concern as the imposition and collection of the New Jersey Spill Act tax, the State moved to dismiss Exxon's complaint.

On July 27, 1981, the Honorable H. Curtis Meanor, U.S. D.J., granted the State's motion. He determined that since the New Jersey Tax Court provided Exxon with a plain, speedy, and efficient remedy for its preemption claim, the Tax Injunction Act divested the federal district courts of jurisdiction over the case. In so ruling, Judge Meanor rejected Exxon's argument that 42 U.S.C. §9613(b) supplanted state court jurisdiction over challenges to state taxing schemes alleged to be inconsistent with the Superfund Act. Rather, he concluded that the strong policy of federal noninterference in state tax matters embodied in the Tax Injunction Act took precedence over the general jurisdictional provision of the Superfund Act and required that this case be brought in state court (Pa14 to Pa19).

Exxon appealed from Judge Meanor's ruling to the United States Court of Appeals for the Third Circuit which affirmed the dismissal for lack of jurisdiction on June 30, 1982 (Pa4 to Pa13). While agreeing with Judge Meanor that the Tax Injunction Act required Exxon to bring its challenge to the New Jersey Spill Act tax in state rather than federal court, the Third Circuit also found that federal jurisdiction was lacking in this case because Exxon's

preemption claim did not "arise under" federal law. It based this latter conclusion on the fact that Exxon's complaint for declaratory relief sought merely to establish the validity of a federal defense to a state cause of action and could not, therefore, support a finding of federal jurisdiction under *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), and *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952) (Pa9 to Pa11). Exxon filed a petition for a Writ of *Certiorari* from this decision of the Third Circuit on September 27, 1982.

While Exxon is now seeking review in this Court of the dismissal for lack of jurisdiction of its federal action challenging the Spill Act tax, it has pursued its State remedies through the New Jersey courts. On April 23, 1982, the Tax Court of New Jersey rendered a decision upholding the State tax against Exxon's preemption challenge. Exxon has since taken an appeal from that decision on the merits to the Superior Court of New Jersey, Appellate Division, where the matter is currently pending.

ARGUMENT

The Third Circuit correctly applied precedents of this Court in finding federal jurisdiction lacking to consider Exxon's challenge to the New Jersey Spill Fund tax under both the Tax Injunction Act and the *Wycoff* doctrine; since the judgment is supportable on either ground, review by this Court is unwarranted, particularly since the decisions of other circuits alleged to be in conflict with the decision below as to the proper application of the *Wycoff* doctrine are distinguishable, and review of this aspect of the case would not change the result in any event.

This case involves a direct attack upon a state tax imposed by a state statute. The opinion below thus correctly found that federal district courts were barred from hearing the matter by the Tax Injunction Act which provides that:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341.

Although this statute speaks in terms of injunctions, it is now settled that the Tax Injunction Act applies to actions for declaratory relief. *California* v. *Grace Brethren Church*, 102 S.Ct. 2498, 2507 (1982). This extension of the jurisdictional bar was deemed necessary because this Court found that permitting anticipatory relief against state tax officials in the declaratory judgment context would be as intrusive as permitting it in the injunction context and would defeat the principal purpose of the Tax Injunction Act: "'to limit drastically federal district court jurisdic-

tion to interfere with so important a local concern as the collection of taxes.'" *Id.* at 2508, quoting from *Rosewell* v. *LaSalle Nat'l. Bank, supra,* 450 U.S. at 522.

The statutory bar to federal court jurisdiction created by the Tax Injunction Act has its roots in principles of federalism and comity and in the recognition of "the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.,* 429 U.S. 68, 73 (1976). Several recent decisions of this Court have emphasized the sensitive nature of state taxing systems and the need for federal court restraint when deciding cases that affect such systems. *California* v. *Grace Brethren Church, supra,* 102 S.Ct. at 2507-2513 (Tax Injunction Act held to divest federal district court of jurisdiction over First Amendment challenge to state unemployment insurance tax scheme); *Fair Assessment in Real Estate Ass'n.* v. *McNary,* 102 S.Ct. 177 (1982) (principle of comity invoked to bar federal courts from granting a refund of local taxes in the form of damages under 42 U.S.C. §1983); *Rosewell* v. *LaSalle Nat'l. Bank, supra,* 450 U.S. at 522 (federal jurisdiction found lacking under Tax Injunction Act to hear due process and equal protection challenge to county real estate assessments). The Third Circuit relied upon these decisions in finding that the district court had properly dismissed Exxon's declaratory judgment action challenging the New Jersey Spill Act tax.* Since these recent Supreme Court precedents amply support the result reached below under the Tax Injunction Act, review of the decision of the Third Circuit by this Court is completely unwarranted.

And, insofar as the petition seeks review of the Third Circuit determination that Supreme Court precedents also

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*There is no dispute over the conclusion that the New Jersey Tax Court procedure does offer a plain, speedy and efficient remedy to taxpayers seeking to challenge a State tax (Pa6 to Pa7).

require the dismissal of Exxon's challenge to the State Spill Act tax for failure to present a claim "arising under" federal law, review by this Court likewise is unwarranted. Since federal courts are courts of limited jurisdiction, and since "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit," *Gully* v. *First Nat'l. Bank*, 299 U.S. 109, 115 (1936), this Court has developed rules to determine the types of issues which provide a right of entry to the federal courts. Essential to a finding of federal jurisdiction is that the federal question appear on the face of the well-pleaded complaint, which means—as the court of appeals noted—that "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." (Pa8, quoting from *Gully, supra*, 299 U.S. at 112-113). See also *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

This Court has carefully scrutinized the jurisdictional limitation of the well-pleaded complaint rule in the declaratory judgment context. This caution stems from the nature of declaratory actions which allow the real position of the parties to be reversed, and from the fact that while the Declaratory Judgment Act enlarged the remedies available in the federal courts, it did not extend their jurisdiction. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). In *Skelly Oil Co.* v. *Phillips Petroleum Co., supra*, 339 U.S. at 672-673, the Court held that where a suit for declaratory relief merely anticipates a defense based on federal law, the action does not "arise under" federal law. Under this holding, when a plaintiff raises and responds to an expected federal defense on the face of a declaratory complaint, such "artful pleading" is insufficient to support federal jurisdiction. Rather, if careful analysis reveals that the only federal issue is

one which anticipates a federal defense to what otherwise is a state cause of action, federal jurisdiction is defeated.

The declaratory judgment context was also a source of concern to the Court in determining whether or not federal jurisdiction existed in *Public Service Commission* v. *Wycoff, Co., supra,* 344 U.S. at 248. There plaintiff filed a complaint in federal court seeking a declaration that it was engaged in interstate commerce and was consequently immune from certain state regulations. The court dismissed the case, indicating that it did not "arise under" federal law because the complaint sought only to establish a federal defense to a state cause of action for enforcement of the regulatory scheme. In support of this finding the Court stated:

> "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [State] courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful

> if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." 344 U.S. at 248 (citations omitted).

This analysis has direct application to the instant case because all that Exxon is seeking through its declaratory complaint is the validation of a claim that Section 114(c) of the Superfund Act excuses it from paying the New Jersey Spill Act tax. Since this Superfund preemption claim amounts to nothing more than a federal defense to the continued collection of a state tax under state law, the Third Circuit correctly applied *Wycoff* and *Skelly* to find federal jurisdiction lacking. Plaintiffs' remedy thus clearly lies in the New Jersey courts where a decision on the merits has already been rendered and is on appeal. Further review of the decision of the court of appeals as to the absence of federal jurisdiction is therefore unwarranted.*

Exxon asserts, however, that review in this Court should be granted to resolve a conflict in the circuits as to how *Wycoff* should be applied to declaratory judgment actions.

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* It is important to note that while jurisdiction in the federal district courts is lacking under both the *Wycoff* doctrine and the Tax Injunction Act, an opportunity for review of a final state court decision addressing the merits of Exxon's preemption claim will of course be available in this Court.

The four cases cited by Exxon in support of its conflict thesis* are clearly distinguishable from the present case, however, if for no other reason than that they did not involve an established state program challenged on the basis of a *post hoc* federal enactment which did not clearly conflict with or necessarily invalidate the state program. Beyond that, the cases cited by Exxon are distinguishable from this case because of the availability of federal injunctive relief—relief unavailable in *Wycoff* and similarly unavailable here.

Such relief is not available to Exxon in the instant case because of the specific statutory bar of the Tax Injunction Act. Since the availability of injunctive relief was cited as an important consideration by circuits which distinguished *Wycoff*, rather than applying it the fact that injunctive relief is not available here severely diminishes the relevance of those decisions to this case and thereby undermines the conflict alleged by Exxon. See *Illinois* v. *General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982); *Braniff Internat'l, Inc.* v. *Florida P.S.C.*, 576 F.2d 1100, 1105 (5th Cir. 1978). Also, one of the principal criticisms of the *Wycoff* doctrine has been its potential to restrict the thrust of *Ex parte Young*, 209 U.S. 123 (1908), which permits the Federal courts to entertain injunctive suits challenging the constitutionality of state statutes. See *Illinois* v. *General Electric Co., supra*, 683 F.2d at 209; Note, "Federal Jurisdiction Over Declaratory Suits Challenging State Action,"

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* The four cases cited by Exxon as conflicting with the decision below are: *First Fed. S. & L. Ass'n. of Boston* v. *Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Braniff Internat'l., Inc.* v. *Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois* v *General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Fed. S. & L. Ass'ns.* v. *Stein*, 604 F.2d 1256 (9th Cir. 1979), aff'd *sub nom Stein* v. *Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980).

79 Col.L.Rev. 983, 999-1000 (1979). Where Congress specifically responded to *Ex parte Young* by divesting federal courts of jurisdiction over particular kinds of challenges to state action, however, this criticism is inapplicable. *Id.* at 997-998. Since the Tax Injunction Act is one such congressional response limiting the reach of *Ex parte Young*, its availability as a jurisdictional bar in the instant case makes the applicability of the *Wycoff* doctrine by the Third Circuit all the more apt. See Note, *supra*, 79 Col.L.Rev. at 997-1001. To have held otherwise would have permitted Exxon to skirt the clear prohibition of the Tax Injunction Act.

In regard to Exxon's conflict thesis it is also important to note that although Exxon has argued that the Seventh and Ninth Circuits have rejected *Wycoff* entirely, this is not the case. Rather, these circuits have applied *Wycoff* to find federal jurisdiction lacking in cases where the factual complex presented appropriately fit within the *Wycoff* doctrine. Compare *Illinois* v. *General Electric Co.*, *supra*, 683 F.2d at 210-211, with *Nuclear Engineering Co.* v. *Scott*, 660 F.2d 241 (7th Cir. 1981) (*Wycoff* invoked to bar federal jurisdiction over declaratory challenge to threatened state enforcement action where compliance with Federal law was alleged and was found to constitute nothing more than a defense to a state cause of action); compare also *Conference of Fed. S. & L. Ass'ns.*, v. *Stein*, *supra*, 604 F.2d at 1259, with *United Air Lines* v. *Division of Indus. Safety*, 633 F.2d 814, 815-817 (9th Cir. 1980) (federal jurisdiction found lacking under *Wycoff* over challenge to California Labor Code where federal issue at most constituted only a defense to state action). Moreover, several of the circuits which have followed *Wycoff* have specifically distinguished the allegedly conflicting cases in other circuits on the facts. See, *e.g.*, *Madsen* v. *Prudential Federal Sav. & Loan Ass'n.*, 635 F.2d 797, 803-804 (10th Cir. 1981); *Michigan Sav. & Loan League* v.

Francis, 683 F.2d 957, 962 (6th Cir. 1982). Thus, there is no clear conflict among the circuits as asserted by Exxon.

The Third Circuit also correctly rejected Exxon's contention that Section 113(b) of the Superfund Act (42 U.S.C. §9613(b)) deprived state courts of the power to adjudicate a challenge to a state tax based on Superfund preemption. In support of this holding, the Third Circuit noted that the exclusive jurisdiction provision of the Superfund Act was limited to controversies "arising under" the Act and did not cover every lawsuit in which the provisions of the Act were relevant, citing *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961). There the Court found that state and not federal court had jurisdiction over a contract action in which the National Gas Act had been raised as a defense, even though that Federal statute contained an exclusive jurisdiction provision. In reaching this conclusion the Court stated that:

> "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." 366 U.S. at 664.

Since Exxon's preemption claim is merely a defense to a state cause of action, it does not "arise under" the Superfund Act; consequently, Section 113(b) does not oust state court jurisdiction over Superfund preemption challenges to state taxing schemes under the rationale of *Pan American.* See also *Public Service Commission* v. *Wycoff, supra,* 344 U.S. at 248.

In addition, the court below correctly rejected Exxon's contention that Congress impliedly removed state court authority to decide challenges to the New Jersey Spill Act tax when it adopted the Superfund Act. In fact, the Third Circuit found this particular claim totally unsupportable when viewed against the strong legislative policy of The Tax Injunction Act which specifically endorses state court jurisdiction over State tax matters. This holding is clearly in keeping with the recent pronouncements of this Court emphasizing the importance of the policies underlying The Tax Injunction Act. See *California* v. *Grace Brethren Church, supra,* 102 S.Ct. 2507-2511; *Fair Assessment in Real Estate Ass'n* v. *McNary, supra,* 102 S.Ct. at 179; *Rosewell* v. *LaSalle Natl. Bank, supra,* 450 U.S. at 515. If Congress had intended to abrogate the Tax Injunction Act, then, it would—as the Third Circuit observed—certainly have done so in clear and explicit statutory language. The silence of the Superfund Act on this point thus further undermines Exxon's claim that Section 113(b) impliedly repealed the Tax Injunction Act. See *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148, 153-154 (1976); *Watt* v. *Alaska,* 451 U.S. 259 (1981); *Penn Dairies* v. *Milk Control Commission,* 318 U.S. 261, 275 (1943). Since the Third Circuit holding correctly gives precedence to the Tax Injunction Act over the general jurisdictional provision of the Superfund Act, review of the decision below by this Court is not warranted on this issue either.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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